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File No. 030815-0000

VIA MESSENGER AND ELECTRONIC MAIL

November 8, 2005

San Diego Regional Water Quality Control Board
Attn: Michael P. McCann, Supervising Engineer
9174 Sky Park Court
Suite 100
San Diego, CA 92123

Re: Tentative Cleanup and Abatement Order No. R9-2005-0126
Comments On Order Of Proceedings Issued October 18, 2005

Dear Mr. McCann:

On October 18, 2005, Chairman Minan, Presiding Officer of the September 26, 2005 Pre-Hearing Conference, issued an Order of Proceedings ("Order") for the adjudicative hearing on Tentative Cleanup and Abatement Order No. R9-2005-0126 ("Tentative CAO"). In the Order, the Presiding Officer makes determinations on procedural issues previously raised by National Steel and Shipbuilding Company ("NASSCO") and other parties and interested persons in written comments and at the September 26th Pre-Hearing Conference. The Order states that it gives final resolution to several procedural issues (subject only to discretionary review by the Regional Board members), and tentatively lays out the proposed order of proceedings for the administrative adjudication. NASSCO appreciates the efforts by the Presiding Officer to address several concerns raised in prior submittals, but objects to certain of the final rulings, and does not believe that the proposed order of proceedings will adequately protect its due process rights. This letter contains our responses to the final rulings of the Order, as well as our recommendation for restructuring the proposed order of proceedings in a manner that is fair, logical, and ensures the due process rights of NASSCO and the other parties that are potentially subject to the terms of the Tentative CAO.

I. COMMENTS ON TENTATIVE RULING – THE ORDER OF PROCEEDINGS

NASSCO objects to the proposed process and several of the concepts laid out in the Proposed Order of Proceeding (Section 3 of the Order), and has a specific recommendation as to a more appropriate and legally sound order of proceedings. NASSCO's objections are described below, and its specific recommendation as to an adequate order of proceedings is given in Section II(B) below.

A. General Objections To The Proposed Order Of Proceedings

1. Time Schedules Should Be Established After Subsequent Pre-Hearing Conferences

As a general matter, NASSCO is opposed to any attempt by the Regional Board to pre-determine time periods for submitting evidentiary comments, completing discovery, responding to and rebutting the comments of other parties and interested persons, and conducting the evidentiary hearings. Without any knowledge of what the Technical Report and supporting documents will consist of, it is impossible for the parties to know how much time will be required for the submission of written materials or the completion of discovery. Similarly, the Presiding Officer will not know the content or scope of the evidence to be presented at the hearing until the case is developed and the issues are narrowed during the discovery period. Rather than attempt to arbitrarily set these time periods now, the Presiding Officer should establish the deadlines for the various tasks comprising these proceedings after future pre-hearing conferences, taking into account the then-quantifiable magnitude of the task to be completed, and the input from the parties in this regard.

The *NASSCO and Southwest Marine Detailed Sediment Investigation* ("Sediment Report"), prepared under the direction and guidance of the Regional Board staff, was submitted in October 2003. The Regional Board staff spent more than 18 months reviewing that report and preparing the Tentative CAO, and has now spent an additional seven months putting together a Technical Report to support the Tentative CAO. Those extended time frames reflect in part the highly technical nature of these issues. Given the length of time it has taken for the Cleanup Team to prepare the Technical Report, it would be arbitrary to put a fixed, severe limit on the amount of time allotted to the designated parties to respond to it, particularly without yet understanding the scope and content of the Technical Report and supporting documents.

For these reasons, the timelines and deadlines should be set after future pre-hearing conferences, when the scope and depth of the tasks to be completed will be better understood by all parties, and the schedule can reflect the highly technical nature of these issues.

2. The Technical Report Must Be A Unified Document That Clearly Shows The Analytical Pathway To The Issuance Of The Tentative CAO

Phase II of the Proposed Order of Proceeding states that "[t]he body of information related to the Tentative CAO shall be referred to as the Technical Report." The Technical Report for a proposed $100-million cleanup simply cannot consist of "all available technical information related to the Tentative CAO" and "an index of the administrative record." That is tantamount to the Regional Board Cleanup Team assembling the proverbial "haystack" of documents and then asserting that the CAO is based on one or more undefined "needles" therein. This is both unfair to parties named in the Tentative CAO, and legally inadequate.

The Regional Board must meet the standard set by the California Supreme Court in *Topanga v. County of Los Angeles*, in particular its requirement that agencies support their conclusions with findings that "facilitate orderly analysis and minimize the likelihood that the

agency will randomly leap from evidence to conclusions." *Topanga v. County of Los Angeles*, 11 Cal.3d 506, 514 (1974). In turn, the findings must be supported by substantial evidence in the record. Here, (1) the "conclusions" should be found in the CAO; (2) the "findings" supporting the conclusions should be in the Technical Report; and (3) the "substantial evidence" supporting the findings should consist of documents and other evidence relied upon in the Technical Report, as well as other documents and evidence that the Cleanup Team considered but chose to disregard when preparing the Technical Report and Tentative CAO. If the Cleanup Team fails to prepare a coherent, stand-alone Technical Report, then the Regional Board plainly will have failed to complete the critical second step.

Topanga and a well-established body of law subsequent to *Topanga* make clear that the Cleanup Team cannot skip any of the three steps, nor can it complete any of them in an inadequate manner. The Cleanup Team, therefore, must prepare a stand-alone Technical Report that lays out and substantiates the findings purporting to support the conclusions reached in the Tentative CAO.

3. The Cleanup Team Cannot Make Changes Without Affording The Parties The Opportunity To Respond

Under the approach outlined in the Order under the heading Phase V, the Cleanup Team (and only the Cleanup Team) would have an opportunity to raise new arguments or modify its findings after discovery, rebuttal, and written submittals are completed by all other parties. The Cleanup Team would also be permitted to issue a "Response to Comments"[1] document and modify the Technical Report and Tentative CAO prior to the evidentiary hearings. We appreciate the Presiding Officer's condition that the Cleanup Team "not submit any new evidence in Phase V." However, the Cleanup Team cannot be permitted to inject last-minute evidence into the proceeding without affording the parties an opportunity to respond. The parties' due process rights would be violated if the Tentative CAO or Technical Report is amended, or additional evidence is disclosed, on the eve of the hearing.

The Cleanup Team is entitled to modify the Technical Report or Tentative CAO, and to respond in writing to written materials from the parties or policy statements from interested persons. The Cleanup Team, however, cannot use Phase V as a means to introduce new evidence or raise new issues to which the other parties have not had an opportunity to respond.

4. The Evidentiary Hearing Must Afford NASSCO Due Process

NASSCO is deeply concerned with several aspects of the tentative ruling on the Phase VII evidentiary hearing, including the Order's assertion that the "primary purpose" of the evidentiary hearing is "to receive comments from the public and summaries of the previously submitted evidence." Under applicable law, the primary purpose of the hearing is to give the

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[1] It is not clear from the Order exactly to what "comments" the Presiding Officer is referring. We reiterate our understanding that regardless of the source, any testimony offered by non-parties to these proceedings (i.e., interested persons) must be strictly limited to policy statements.

parties named in the Tentative CAO ample opportunity to present their case why the Tentative CAO should not be issued, or at a minimum, why it should not be issued in its current form.

The APA defines "adjudicative proceeding" as "an evidentiary hearing for determination of facts pursuant to which an agency formulates and issues a decision." Cal. Gov't Code § 11405.20. The first clause of the APA's "Bill of Rights" states "[t]he agency shall give the person to which the agency action is directed notice and an opportunity to be heard, including the opportunity to present and rebut evidence." Cal. Gov't Code § 11425.10(a)(1). The statutory provisions emphasize that the primary purpose of an adjudicatory proceeding is to present evidence and give the party that is subject to the agency's action an opportunity to present its position against the agency action.

The activities expressly listed in Regional Board's own regulations controlling adjudicative proceedings include (1) presentation of evidence by the parties; (2) cross-examination of witnesses; and (3) redirect and recross-examination. Cal. Code of Regs. Tit. 23 § 648.5(b). Presentation of policy statements is permitted, though only at the discretion of the Regional Board. Cal. Code of Regs. Tit. 23, §§ 648.1(d), 648.5(c). It is clear from the statutory and regulatory provisions that the evidentiary hearing cannot be limited to the mere presentation of "summaries" of previously-submitted evidence and comments. The parties that are potentially the subject of a $100 million cleanup order must be afforded the full opportunity to present their case to the Regional Board members.

Further, cross-examination cannot only be available "at the discretion of the Regional Board." The right of cross-examination is a fundamental aspect of any adjudication. If the Cleanup Team or the newly-designated parties (or any other person) puts forth evidence at the hearing, NASSCO must be permitted to cross-examine their witnesses and experts, both to test their credibility and to determine the basis for their positions.

Furthermore, the Regional Board's regulations governing adjudicative proceedings expressly incorporate Sections 801 to 805 of the Evidence Code, pertaining to expert and witness testimony. Cal. Code of Regs. Tit. 23, § 648(b); Cal. Evid. Code §§ 801-805. The current proceedings must comply with these sections of the Evidence Code, including the provisions limiting expert testimony to matters within the expert's special knowledge, skill, experience, and training (§ 801(b)), excluding witnesses' opinions that lack a proper basis (§§ 802, 803), and providing the right to cross-examine persons upon whom a called expert's opinion is based (§ 804). These evidentiary requirements are applicable to all testimony, including that offered by the Cleanup Team.

NASSCO appreciates the public nature of this proceeding, and fully embraces the concept of public participation in the proceeding and public comment at the hearing(s). However, the Regional Board must recognize that this is an adjudication, and as such, the parties' rights are paramount, including their right to present evidence, cross-examine *any* person presenting more than policy statements, and challenge the admissibility of witness testimony.

B. NASSCO'S Proposed Order of Proceedings

In addition to these specific objections, NASSCO proposes the following order of proceedings, which we believe accurately reflects the scope and complexity of these proceedings, and affords due process to the parties that are potentially subject to the terms of the CAO. We reiterate, however, the general point that timing and deadlines for these steps should be determined at future pre-hearing conferences. Therefore, we do not attempt to identify specific time periods for every step, though we note in some cases where we feel the allotted time is not sufficient to afford due process. We further note that several of the steps suggested below are not currently included in the Regional Board's Order of Proceeding, but are steps that are nonetheless essential to ensure due process and a logical flow of these proceedings.

1. **Issuance Of Technical Report**: The Cleanup Team should issue a stand-alone Technical Report, and identify and provide access to all supporting documents, as well as the entire administrative record for this matter, which must include documents and other evidence that the Cleanup Team considered but chose not to rely upon when preparing the Technical Report and Tentative CAO. See discussion at Section I(A)(2) above.

2. **Pre-Hearing Conference**: A pre-hearing conference should be held shortly after the issuance of the Technical Report and the release of the supporting documents, in order to further define the parameters and timing for discovery. Based on input from the parties at this pre-hearing conference, the Presiding Officer should consider issuing something analogous to a Case Management Order ("CMO"), which is typically issued by judges in complex controversies involving multiple parties, such as this one.[2] The CMO would address issues such as the phasing of proceedings, procedures for resolving discovery disputes, time limits to respond to discovery requests, procedures for production of documents, procedures regarding depositions (including scheduling, deposition stipulations, production associated with depositions, etc.), disclosure of experts, etc. This approach would avoid delays associated with discovery or other disputes, and would promote the efficient use of all Parties' (and the Advisory Team's) resources. The Presiding Officer should reserve the right to modify the CMO in later phases of the proceedings, and hold future pre-hearing conferences towards this end.

3. **Review Technical Report**: The designated parties should be afforded ample time prior to commencement of the discovery period, to review the draft Technical Report and supporting documents. This review period is

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[2] See, e.g., Judicial Council of California, *Deskbook On The Management of Complex Civil Litigation* (2004), § 1.04 (a CMO "should include procedures for identifying and resolving disputed issues of law, identifying and narrowing disputed issues of fact, carrying out disclosure and conducting discovery in an efficient and economical manner, and preparing for trial if the case is not resolved by settlement or summary disposition.")

necessary given the complex nature of the technical issues, the gravity of the CAO, the anticipated amount of supporting documentation, and the need to chart an efficient course for discovery.

4. **Discovery**: In light of (i) the necessary sequencing of discovery (i.e., the parties must obtain and review the relevant documents before initiating depositions); (ii) the scope and complexity of the issues; and (iii) the number of parties in the case, the discovery phase of these proceedings will undoubtedly take longer than the ninety days proposed in the Order.

   Discovery should be broken down into the following subtasks, with a separate and sufficient allotment of time for each subtask.

   a. *Discovery Exclusive Of Depositions*: The initial discovery period should consist of traditional document discovery (e.g., requests for production of documents, subpoenas, requests for admissions, interrogatories, and other deposition tools, but not including depositions). Another pre-hearing conference may need to be held at the close of this phase to schedule and coordinate depositions based on information gathered during the initial discovery period. Importantly, the sequence of discovery should reflect the prosecutorial nature of these proceedings. The Cleanup Team should first have to designate its witnesses, produce its reports and supporting materials, and respond to discovery. Then other proponents of the Tentative CAO should have to do so, followed by the parties named in the Tentative CAO.

   b. *Depositions*: Ample time should be dedicated for depositions of witnesses. With more than ten parties now named in this proceeding, merely scheduling depositions to allow participation by all parties will be a challenging and time-consuming exercise, as will the taking of the depositions themselves.

5. **Preparation of Written Materials After Discovery**: A separate period of time should be allotted -- commencing from after the completion of the final deposition in Step 4 -- for the processing of the information gathered during the discovery period and the preparation of written submittals. For example, expert reports based on the evidence obtained during the discovery phase should be submitted during this stage. The parties will be unable to formulate their legal and technical arguments until the discovery period is complete.

6. **Rebuttal**: This period generally corresponds with Phase IV of the Proposed Order of Proceeding. However, thirty days is not sufficient for the rebuttal period. Rebuttal should be broken down into the following subtasks, with a separate and sufficient allotment of time for each:

a. *Review Written Materials*: With written submissions from more than ten designated parties (and countless expert witnesses), another review period is necessary before launching into rebuttal efforts. The review period is necessary to process all written materials and develop an efficient approach for preparing rebuttal documents and conducting additional discovery.

b. *Conduct Additional Discovery/Prepare Rebuttal Materials*: Rebuttal will potentially involve deposing or cross-examining witnesses, including witnesses submitting reports under Step 5. All parties, including the Cleanup Team, should be available to respond to discovery requests and participate in additional depositions. Depending on the complexity of the proceedings at this juncture, another pre-hearing conference may be appropriate to coordinate the rebuttal activities and fix an appropriate time period for submittal of rebuttal evidence.

7. **Non-Binding Summary of Areas of Disagreement**: Shortly after the preparation and submittal of written materials after discovery is complete, the parties can attempt to collectively determine a non-binding summary of the areas of disagreement.

8. **Cleanup Team Response To Submittals**: To ensure fair proceedings, if the Cleanup Team seeks to revise the Technical Report or Tentative CAO prior to the hearing, the other parties must be afforded the opportunity to address the Cleanup Team's responses and/or revisions to the Technical Report/Tentative CAO. See discussion at Section I(A)(3) above.

9. **Hearing Briefs**: After the Rebuttal period, the parties should have the opportunity to submit final briefs based on the entirety of the record developed at the close of the discovery and rebuttal periods. In particular, because it is unlikely that the Regional Board members can dedicate extended periods of time to the evidentiary hearings, the hearing briefs allow the parties to present the arguments to the Board in an orderly and concise manner, and frame the issues for the hearing.

10. **Evidentiary Hearing**: Another pre-hearing conference should be held prior to the scheduling of the evidentiary hearing. The parameters of the evidentiary hearing(s) should be established at this pre-hearing conference, consistent with the comments raised in this letter regarding the parties' due process rights at that hearing.

II. OBJECTIONS TO FINAL RULINGS OF ORDER

A. Designated Parties

NASSCO has previously submitted comments to the Regional Board regarding Final Ruling 2, Designation of Parties.[3] Our primary concern is, and has been, that the Presiding Officer does not appear to be applying any standard in making the determinations whether to grant designated party status. Section 11440.50 of Chapter 4.5 of the California Administrative Procedure Act ("APA") (Cal. Gov't Code § 11400, *et seq*) expressly applies to these proceedings through Section 648(b) of Title 23 of the California Code of Regulations. Section 11440.50 provides a three-prong test for determining whether a person may intervene into an agency's adjudicative proceedings. There is no indication in the Order whether this standard -- or any other standard -- was applied in making determinations on the designated party applications.

The Presiding Officer adhered to the first prong of the APA intervention standard by requiring persons seeking intervention to submit written motions to the Regional Board and serve copies on all parties named in the Tentative CAO. Cal. Gov't Code §§ 11440.50(b)(1), (2). The Presiding Officer also appears to have at least considered the third prong of the intervention standard, which requires the presiding officer to determine whether "the interests of justice and the orderly and prompt conduct of the proceeding will ... be impaired by allowing the intervention." Cal. Gov't Code § 11440.50(b)(4). However, the Order's treatment of the third prong is conclusory. The Order merely states that granting designated party status to BayKeeper, the Environmental Health Coalition ("EHC"), and the San Diego Port Tenants Association ("SDPTA") will not impair the interests of justice and the orderly and prompt conduct of the proceeding, and conversely that granting party status to the Industrial Environmental Association ("IEA") and the Port of San Diego Ship Repair Association ("SRA") "may" impair it. The Order, therefore, provides no analysis of how the Presiding Officer reached this conclusion, and only offers that certain of the applicants "will not" or "may" impair the conduct of the proceedings.

The Order is conspicuously lacking <u>any</u> discussion of the centerpiece of the APA intervention standard: whether "the applicant's legal rights, duties, privileges, or immunities will be substantially affected by the proceeding." Cal. Gov't Code § 11440.50(b)(3). This is the critical question with respect to an intervention determination since practically any person could satisfy the other two prongs.[4] However, this second prong asks the Regional Board to make a specific determination as to the substantive effect the Tentative CAO may have on the applicant, and also to determine the degree of that effect, i.e., whether the effect is substantial. Based on the Order, it does not appear that the "substantial effect" prong of the intervention test was applied.

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3 All previous NASSCO comments and submittals are expressly incorporated into this letter.

4 For example, any person could file a motion seeking designated party status, and make a good faith showing that they would not disrupt the orderly conduct of the proceedings. The applicant could also agree to participate in a non-disruptive fashion, or the Presiding Officer could "impose conditions on the intervenor's participation" so as to ensure the orderly conduct of the proceedings.

More generally, it is not clear if any standard was applied, or if the Presiding Officer did apply a standard, how it was applied. If a standard was applied, it was done so inconsistently. For example, why are two environmental groups granted party status, and only one non-environmental group? Why would the industry associations -- IEA and SRA -- impair the orderly conduct of the proceedings, while apparently EHC and BayKeeper would not? It is impossible to know the bases for these distinctions from the Order. Even if it was assumed true that IEA's and SRA's interests could be adequately represented by other designated parties,[5] then it should also be true that BayKeeper and EHC's interests could be adequately represented by the Regional Board Cleanup Team, whose primary purpose is to protect water quality. At a minimum, one environmental group's interests could be adequately protected by the other.

It is precisely to avoid these uncertainties and inconsistencies that the APA's intervention standard requires the Regional Board to state the reasons for its intervention determinations. Cal. Gov't Code § 11440.50(d). Without laying out the basis for the determinations, the Order has not only failed to satisfy the APA requirements, but has failed to satisfy minimum due process requirements -- agency decisions must be supported by findings, and findings be supported by substantial evidence in the record. *Topanga*, at 516. As *Topanga* points out, the purpose of requiring that findings be supported by the evidence is to "facilitate orderly analysis and minimize the likelihood that the agency will randomly leap from evidence to conclusions." *Id.* To satisfy the *Topanga* standard, the Order must explain what intervention standard was applied, and explain how that standard was applied to each of the persons seeking designated party status.

B. List Of Contested Issues Of Fact And Law

NASSCO will use best efforts to comply with Final Ruling 4, which asks that the parties collectively generate a comprehensive list of contested issues of fact and law. While in principle we do not oppose Ruling 4, this list cannot be generated until the end of the discovery period, as we suggest in our recommended order of proceedings above. It is impossible for us to pinpoint all disputed issues until we have had the opportunity to thoroughly review all relevant documents and the Technical Report (to be issued by Regional Board Cleanup Team), take depositions, and conduct other forms of discovery. We therefore object to the requirement to submit this list within 30 days of the start of the proposed discovery period.

C. Length And Date Of Hearing(s)

To the extent that Final Ruling 5 does not make any specific determinations with respect to the length and procedures to be employed at the evidentiary hearing, NASSCO is not opposed to it. However, we renew our firm opposition to any attempt by the Regional Board to limit the parties' participation at the hearing to "summarizing" advance written submissions of testimony and evidence. The amount of time to be provided to NASSCO and the other parties at the hearing must correspond with the complexity of the record and the enormous potential impact to the parties. See Cal. Gov't Code § 11425.10(1); *Matthews v. Eldridge* (1972) 424 U.S. 319, 333; *Horn v. County of Ventura* (1979) 24 Cal. 3d 605, 612. The parties must be allotted adequate

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[5] We note that whether an applicant's "interests are adequately represented" by other designated parties in the proceeding is not a standard found in any of the regulations or statutes governing these proceedings.

time to present evidence, call and question witnesses, and cross examine opposing witnesses. See Cal. Code Regs., Tit. 23, § 648.5(a)(5) (2005); Cal. Gov't Code § 11513(b). As discussed in our recommended order of proceedings above, the appropriate forum for scheduling the length, dates, and other details of the evidentiary hearings is at a future Pre-Hearing Conference held after the close of discovery.

D. Location Of Hearing

NASSCO has no preference as to the location of the hearing(s), provided that there is ample space and sufficient audio-visual equipment to support a hearing of this nature.

E. Service Requirements/Contact Information

NASSCO requests that Kelly Richardson of Latham & Watkins be designated as the primary NASSCO representative for purposes of service of documents in this matter (for both electronic and hard copy submittals). NASSCO further requests that Lane McVey, Vice President, Business Affairs and Law, and T. Michael Chee, Environmental Manager, be added to the email service list. The addition of these names to the email distribution list should not significantly increase the administrative burden of electronic submittals on any party. The contact information for these individuals is enclosed with this letter.

NASSCO thanks the Presiding Officer for reducing the number of hard copies that must be submitted to twelve. However, we continue to understand this submittal requirement to encompass only direct testimony, reports prepared by our experts, and other legal and policy arguments that we or our experts prepare. We do not understand this requirement to mean that we will be required to submit twelve copies of all technical supporting documents, which may amount to a very large volume. We are happy to provide electronic copies and an index of the supporting documents, in addition to two hard copies to be submitted to the Regional Board.

F. Pre-Hearing Conferences

NASSCO encourages the use of the Pre-Hearing Conference process frequently during these proceedings. As we explained in our recommended order of proceedings above, determinations such as the length of time to complete discovery, review documents, or make written submittals, or the details of other procedural issues, are best made when the Presiding Officer and the parties fully comprehend the scope of the task at hand. Future Pre-Hearing Conferences provide the appropriate forum through which to discuss and make these determinations.

III. CONCLUSION

NASSCO respectfully requests that the Regional Board consider the foregoing comments and proposed order of proceedings. We further ask the Presiding Officer to modify the Order of Proceedings consistent with the objections raised in this letter.

Very truly yours,

For
David L. Mulliken
of LATHAM & WATKINS LLP

Encl: NASSCO Contact Information

cc: See Attached E-Mail Service List

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